

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEVADA  
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4 United States of America,  
5 Plaintiff  
6 v.  
7 Craig P. Orrock,  
8 Defendant  
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2:16-cr-00111-JAD-CWH-1

**Order Adopting Reports and  
Recommendation**

[ECF Nos. 22, 57, 76]

10 Defendant Craig P. Orrock was indicted for tax evasion after allegedly using an LLC as a  
11 nominee to sell one of his properties and hide the profits from the IRS.<sup>1</sup> Orrock moves to dismiss  
12 count 2, which charges him with “evasion of assessment of tax.”<sup>2</sup> He argues that count 2 fails to  
13 state an offense and that the statute-of-limitations period has expired.<sup>3</sup> Magistrate Judge  
14 Hoffman recommends that I deny the motion.<sup>4</sup> After considering Orrock’s objection to Judge  
15 Hoffman’s recommendation and reviewing his original motion de novo, I overrule the objection,  
16 accept and adopt the recommendation, and deny the motion.  
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24 <sup>1</sup> ECF No. 1.  
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26 <sup>2</sup> *Id.* at 3.

27 <sup>3</sup> ECF No. 22 at 3.

28 <sup>4</sup> ECF No. 57.

1 **Background<sup>5</sup>**

2 The Government alleges that, in 2001, Orrock used a nominee to purchase real property  
3 that it refers to as the Arville Property.<sup>6</sup> The nominee then deeded the Arville Property to Arville  
4 Properties, LLC.<sup>7</sup> Although the LLC was not organized under Orrock's name, the Government  
5 alleges that Orrock is the true owner because he "controlled the company and was the sole signor  
6 of the company's bank account."<sup>8</sup> Then in 2007, Arville Properties, LLC sold the Arville  
7 Property for \$1.5 million, and Orrock made approximately \$810,000 in profits from the sale.<sup>9</sup>  
8 Orrock filed his personal federal-income-tax return for 2007 in 2009, but he did not report any  
9 income earned from the sale of the Arville Property.<sup>10</sup> The IRS notified Orrock in February 2011  
10 that his 2007 federal-income-tax return was being audited, and three months later, Orrock filed a  
11 false 2007 tax return for Arville Properties LLC that did not report the sale either.<sup>11</sup>

12 A grand jury indicted Orrock on April 12, 2016, on three counts: (1) evasion of payment  
13 of tax; (2) evasion of assessment of tax; and (3) attempts to interfere with administration of  
14 internal revenue laws.<sup>12</sup> Orrock moves to dismiss count 2,<sup>13</sup> Magistrate Judge Hoffman  
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17 <sup>5</sup> These background facts provide context to the allegations in count 2 of the indictment, and they  
18 are not intended as findings of fact. I base my decision on the allegations contained within the  
19 four corners of the indictment.

20 <sup>6</sup> ECF No. 28 at 2.

21 <sup>7</sup> *Id.*

22 <sup>8</sup> *Id.*

23 <sup>9</sup> *Id.*

24 <sup>10</sup> *Id.*; ECF No. 22 at 4.

25 <sup>11</sup> ECF No. 28 at 2–3.

26 <sup>12</sup> ECF No. 1.

27 <sup>13</sup> ECF No. 22.

recommends that I deny the motion,<sup>14</sup> and Orrock specifically objects to the recommendation, reiterating his motion-to-dismiss arguments that count 2 fails to state an offense and that it's barred by the statute of limitations.<sup>15</sup>

## Discussion

### A. Specific-objection standard

A district court reviews objections to a magistrate judge's proposed findings and recommendations de novo.<sup>16</sup> "[R]eview de novo means that the court should make an independent determination of the issues and should not give any special weight to the prior determination of the [magistrate judge]."<sup>17</sup> "Normally, the judge . . . will consider the record which has been developed before the magistrate and make [her] own determination on the basis of that record, without being bound to adopt the findings and conclusions of the magistrate."<sup>18</sup> "The district judge may accept, reject, or modify the recommendation, receive further evidence, or resubmit the matter to the magistrate judge with instructions."<sup>19</sup>

### B. Motion-to-dismiss standard

"Federal Rule of Criminal Procedure 12(b) allows a defendant to file a pretrial motion to dismiss an indictment for failure to state an offense if the motion 'can be determined without a trial on the merits.'"<sup>20</sup> "A motion to dismiss is generally capable of determination before trial if it

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<sup>14</sup> ECF No. 57.

<sup>15</sup> ECF No. 76.

<sup>16</sup> *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121–22 (9th Cir. 2003).

<sup>17</sup> *United States v. Raddatz*, 447 U.S. 667, 690 (1980) (quoting *United States v. First City National Bank*, 386 U.S. 361, 368 (1967) (internal quotations and ellipses omitted)).

<sup>18</sup> *Id.* at 675.

<sup>19</sup> *Reyna-Tapia*, 328 F.3d at 1121–22.

<sup>20</sup> *United States v. Kelly*, 874 F.3d 1037, 1046 (9th Cir. 2017); FED. R. CRIM. P. 12(b)(3)(B)(v).

1 involves questions of law rather than fact.”<sup>21</sup> “In determining whether an indictment charges a  
2 cognizable offense, [I am] bound by the four corners of the indictment, must accept the truth of  
3 the allegations in the indictment, and cannot consider evidence that does not appear on the face  
4 of the indictment.”<sup>22</sup> An indictment need only be a “plain, concise, and definite written statement  
5 of the essential facts constituting the offense charged.”<sup>23</sup> “An indictment returned by a legally  
6 constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its  
7 face, is enough to call for trial of the charge on the merits.”<sup>24</sup> “Dismissal of an indictment is  
8 considered a ‘drastic step’ and is generally disfavored as a remedy.”<sup>25</sup>

9 **C. Count 2 sufficiently alleges each element of the crime of tax-assessment evasion.**

10 Orrock is charged with tax-payment evasion and tax-assessment evasion, both in  
11 violation of 26 U.S.C. § 7201.<sup>26</sup> Section 7201 proscribes “the offense of willfully attempting to  
12 evade or defeat the assessment of tax as well as the offense of willfully attempting to evade or  
13 defeat the payment of a tax.”<sup>27</sup> “Evasion of assessment generally involves efforts to prevent or  
14 deter the government from determining tax liability prior to an assessment, for example by  
15 ‘failing to file a return, filing a false return, failing to keep records, concealing income or other  
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19 <sup>21</sup> *Kelly*, 874 F.3d at 1046 (quoting *United States v. Nukida*, 8 F.3d 665, 669 (9th Cir. 1993)  
20 (quotations omitted)).

21 <sup>22</sup> *Kelly*, 874 F.3d at 1047; *United States v. Lyle*, 742 F.3d 434, 436 (9th Cir. 2014); *United States*  
22 *v. Jensen*, 93 F.3d 667, 669 (9th Cir. 1996).

23 <sup>23</sup> *United States v. Davis*, 336 F.3d 920, 922 (9th Cir. 2003) (quoting FED. R. CRIM. P. 7(c)(1)).

24 <sup>24</sup> *Costello v. United States*, 350 U.S. 359, 363 (1956).

25 <sup>25</sup> *Guam v. Muna*, 999 F.2d 397, 399 (9th Cir. 1993) (quoting *United States v. Rogers*, 751 F.2d  
26 1074, 1076–77 (9th Cir. 1985)).

27 <sup>26</sup> ECF No. 1.

28 <sup>27</sup> *Sansone v. United States*, 380 U.S. 343, 354 (1965).

1 means.”<sup>28</sup> “Evasion of payment, by comparison, generally involves conduct designed to place  
2 assets beyond the government’s reach after a tax liability has been assessed, such as by  
3 transferring assets abroad, placing assets in the names of others, or using cash transactions to  
4 conceal the existence of assets.”<sup>29</sup> Regardless, tax-payment evasion and tax-assessment evasion  
5 are two methods of committing the same crime: tax evasion.<sup>30</sup>

6 Orrock challenges only the tax-assessment-evasion charge.<sup>31</sup> The elements of a § 7201  
7 violation are: (1) willfulness; (2) the existence of a tax deficiency; and (3) an affirmative act  
8 constituting an evasion or attempted evasion of the tax.<sup>32</sup> The elements are the same whether the  
9 charge is for evading assessment or payment; the only distinction is the timing of the affirmative  
10 act.<sup>33</sup> An affirmative act before tax liability is assessed is an assessment-evading act, while an act  
11 after assessment and before payment is a payment-evading act.<sup>34</sup> Orrock does not challenge  
12 count 2 on the first two elements; he challenges only the affirmative-act element.<sup>35</sup>

13 Count 2 for tax-assessment evasion alleges in its entirety:

14 That in or about February 2007, and continuing to at least on or  
15 about May 9, 2011, in the District of Nevada, CRAIG P. ORROCK  
16 did willfully attempt to evade and defeat the assessment of a large  
part of the income tax due and owing by him to the United States

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17 <sup>28</sup> *United States v. Mal*, 942 F.2d 682, 687 (9th Cir. 1991) (quoting *Cohen v. United States*, 297  
18 F.2d 760, 770 (9th Cir. 1962)).

19 <sup>29</sup> *Mal*, 942 F.2d at 687 (citing *United States v. Conley*, 826 F.2d 551, 556–58 (7th Cir. 1987),  
20 and *United States v. Voorhies*, 658 F.2d 710, 714 (9th Cir. 1981)).

21 <sup>30</sup> *Id.* at 688 (“We thus conclude that § 7201 charges only the single crime of tax evasion, and  
22 that an individual violates the statute either by evading the assessment or the payment of taxes.”).

23 <sup>31</sup> ECF No. 22.

24 <sup>32</sup> *Sansone*, 380 U.S. at 351 (citing *Lawn v. United States*, 355 U.S. 339, 361 (1958) and *Spies v.*  
25 *United States*, 317 U.S. 492, 493–94 (1943)).

26 <sup>33</sup> *See supra* notes 28–29 and accompanying text.

27 <sup>34</sup> *Id.*

28 <sup>35</sup> ECF No. 22.

1 of America for the calendar year 2007, by concealing both  
2 ownership of property he held through a nominee known as Arville  
3 Properties, LLC, and the proceeds from the sale of such property  
4 from the Internal Revenue Service, and thereby evading the proper  
5 assessment of his 2007 federal income taxes.

6 All in violation of Title 26, United States Code, Section 7201.<sup>36</sup>

7 Count 2 sufficiently alleges that Orrock performed an affirmative act that could constitute  
8 tax-assessment evasion. The federal system's liberal pleading standard requires the Government  
9 to allege that Orrock committed "one or more affirmative acts of evasion of assessment,"<sup>37</sup> but  
10 the Government went beyond that and provided two specific affirmative-act theories: concealing  
11 ownership and concealing profits.

12 Orrock argues that concealing his ownership of the Arville Property by using a nominee  
13 to sell it "by definition has no effect on assessment of taxes"<sup>38</sup> because "[i]f Arville was  
14 [Orrock's] nominee, Arville had no separate existence from [Orrock] for tax purposes, and all  
15 reportable taxes (whether they were actually reported or not) arising from the Arville transaction  
16 could only have been reported on [Orrock's] personal form 1040."<sup>39</sup> Orrock cites no authority  
17 for the proposition that using a nominee to own and sell a property cannot, as a matter of law,  
18 constitute an evasion or attempted evasion of tax-liability assessment. He merely cites to two  
19 cases that hold a taxpayer liable for profits and losses on a property held or sold by a nominee.<sup>40</sup>  
20 These two cases do not support Orrock's argument.

21 The Government alleges that Orrock used a nominee to conceal his ownership of a  
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23 <sup>36</sup> ECF No. 1 at 3.

24 <sup>37</sup> FED. R. CRIM. P. 7(c)(1) ("A count may allege that the means by which the defendant  
25 committed the offense are unknown or that the defendant committed it by one or more specified  
26 means.").

27 <sup>38</sup> ECF No. 22 at 4.

28 <sup>39</sup> *Id.* at 4–5.

<sup>40</sup> ECF No. 22 at 5; *see Heaton v. C.I.R.*, 57 T.C.M. (CCH) 1412 (1989); *Householder v. C.I.R.*,  
58 T.C.M. (CCH) 381-3 (1989).

1 property and the income he earned when the property sold. Regardless of how he did it,  
2 concealing ownership of a property and the income gained from selling that property can both be  
3 attempts to evade tax assessment—that is for a jury to decide.

4 Orrock also argues that his tax liability for 2007 was definitively assessed on March 30,  
5 2009, so “[a]ny affirmative acts occurring after a tax liability for 2007 was determined to be due  
6 and owing can only support an attempt to evade *payment*, not *assessment* as count 2 alleges.”<sup>41</sup>  
7 This argument relies entirely on Orrock’s incorrect statement that any assessment on March 30,  
8 2009, of his 2007 tax liability was final. As the Government points out, “the IRS opened a civil  
9 audit on Orrock for the 2007 tax year,” and in April 2011, the IRS notified Orrock that it was  
10 auditing his 2007 tax liability.<sup>42</sup> When the IRS performs an audit, it assesses the taxpayer’s tax  
11 liability.<sup>43</sup> So, if Orrock performed an affirmative act while his tax liability was being reassessed  
12 through the audit, that act could be an attempt to evade tax-liability assessment.

13 Finally, Orrock argues that the six-year statute of limitations on count 2 has run. The  
14 Government’s allegation that Orrock’s tax-evasion attempts persisted until at least May 9, 2011,  
15 is sufficient to overcome Orrock’s argument. The six-year statute of limitations for tax evasion  
16 “begins to run from the occurrence of the last act necessary to complete the offense[.]”<sup>44</sup> If  
17 Orrock committed an affirmative act on May 9, 2011, he completed the offense on that date, so  
18 the statute of limitations would have expired on May 9, 2017. The Government charged the case  
19 in April 2016—13 months before the limitations period expired.

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21 <sup>41</sup> ECF No. 22 at 5.

22 <sup>42</sup> ECF No. 28 at 8.

23 <sup>43</sup> INTERNAL REVENUE SERVICE, *Chapter 13. Audit Reconsideration: 4.13.1.2 Definition of an*  
24 *Audit Reconsideration* (Dec. 16, 2015)  
25 [https://www.irs.gov/irm/part4/irm\\_04-013-001#idm139937429090752](https://www.irs.gov/irm/part4/irm_04-013-001#idm139937429090752) (“An audit  
26 reconsideration is the process the IRS uses to reevaluate the results of a prior *audit where*  
27 *additional tax was assessed and remains unpaid, or a tax credit was reversed.*”) (emphasis  
added).

28 <sup>44</sup> *United States v. Carlson*, 235 F.3d 466, 470 (9th Cir. 2000).

1 **Conclusion**

2 Accordingly, IT IS HEREBY ORDERED that Magistrate Judge Hoffman's report and  
3 recommendation to deny Orrock's motion to dismiss count 2 [ECF No. 57] is **ACCEPTED and**  
4 **ADOPTED**, Orrock's objection to Judge Hoffman's report and recommendation [ECF No. 76]  
5 is **OVERRULED**, and Orrock's motion to dismiss count 2 [ECF No. 22] is **DENIED**.

6 DATED: December 4, 2017.

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8 U.S. District Judge Jennifer A. Dorsey  
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